No. 79-1252 and 79-1502

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

KERN COUNTY WATER AGENCY, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

JACQUES B. GELIN
ROBERT L. KLARQUIST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the Rivers and Harbors Act of 1899 includes an implied right of action enabling private parties to seek civil enforcement of Section 10 of the Act.

2. Whether Section 10 of the Rivers and Harbors Act of 1899 applies to a state water allocation project that diverts water from a navigable channel where the diversion alters or modifies the course, location, condition, or capacity of the channel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-62)[1] is reported at 610 F.2d 581. The opinion of the district court (Pet. App. 63-129) is reported at 400 F.Supp. 610.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1979. A petition for rehearing was denied on January 17, 1980. The petition in No. 79-1252 was filed on February 13, 1980, and granted on October 6, 1980. The petition in No. 79-1502 was filed on March 17, 1980, and granted on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 10 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any

[1] All "Pet. App." references in this brief refer to the separately bound appendix to the petition filed by Kern County Water Agency *et al.* in No. 79-1502.

port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Section 12 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 406, provides:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

Section 17 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 413, provides:

> The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, and 412 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action

taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a magistrate, judge, or court of the United States for examination of the offenses alleged against him; and such magistrate, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

STATEMENT

1. The California Water Project (CWP) was constructed primarily for the purpose of transporting water from the northern portions of California, where precipitation is comparatively abundant, to the more arid southern half of the State, where most of the population and irrigable lands are located. The CWP consists of a series of water storage and transportation works and associated facilities. Among other things, the CWP stores runoff behind dams in the Sacramento River watershed. As those waters are needed, they are released and flow down the Sacramento River to the Delta, a low-lying area of islands and interconnecting channels at the con-

fluence of the Sacramento and San Joaquin Rivers, located to the east of San Francisco Bay.[2] There, the released waters merge with other waters in the Delta. Portions of the augmented Delta waters are then pumped out for transportation to the central and southern regions of the State (Pet. App. 8-9).

The CWP consists of both federal and state components. The federal component is known as the Central Valley Project (CVP) and is administered by the Secretary of the Interior through the Bureau of Reclamation (Pet. App. 8).[3] The essential operations and features of the massive and complex CVP were described by this Court in *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 279-287 (1958), and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950). The state component of the CVP is known as the State Water Project (SWP) and is operated by California Department of Water Resources (Pet. App. 9).

In the courts below, the operations of both federal and state components were at issue. The federal facility—the Tracy Pumping Plant—began operations in 1951 (Pet. App. 69). Located on an inlet channel of the Old River at the southern margin of the Delta, this plant lifts Delta waters into the northern terminus of the Delta-Mendota Canal, a 115-mile canal extending from the Delta to the Mendota Pool in the Central Valley (*id.* at 9, 69-70).

The SWP depends upon the Delta Pumping Plant, a state-operated facility located approximately two miles west of the Tracy Pumping Plant, to lift the waters diverted from the Delta to the northern terminus of the state-owned and operated California Aqueduct, which

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[2] A map of the Delta was reproduced as an exhibit to the district court's opinion (Pet. App. 130, Exh. A).

[3] The Bureau of Reclamation was recently renamed the "Water and Power Resources Service," but the term "Bureau of Reclamation" will be used in this brief because that is the term used in the opinions below.

carries the water to southern California (Pet. App. 69-70). The Delta Pumping Plant, which presently has an installed pumping capacity of 6,300 cubic feet per second, began operations in late 1967 (*ibid.*). Waters to be pumped through the Delta Pumping Plant are temporarily stored in an artificial body of water known as the Clifton Court Forebay. The Forebay diverts water from the Delta through an intake structure consisting of five radial gates that connect the Forebay to West Canal. West Canal in turn is connected to the Old River (*id.* at 71).

Under the present system, the quality of the released waters is significantly degraded when they mingle with other Delta waters. To improve the quality of waters transported through the Delta-Mendota Canal and the California Aqueduct, the State has proposed to construct a 42-mile canal around the eastern margin of the Delta to carry high quality water directly from the Sacramento River to the Tracy and Delta Pumping Plants. This proposed canal, known as the Peripheral Canal, would also release fresh water at various points along its route to improve water quality within the Delta (Pet. App. 71). Although the federal Bureau of Reclamation participated to a limited degree in the planning of the canal, Congress has not authorized federal participation in the construction of the Peripheral Canal, nor has it appropriated any construction funds for the project.

2. Respondents Sierra Club, Hank Schramm, and William Dixon, together with another environmental organization and another individual (hereinafter collectively referred to as "plaintiffs")[4] filed this action against the federal and state defendants in 1971 in the United States

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[4] One of the three individual plaintiffs was dropped from the Amended Complaint (R. 444), and plaintiff Friends of the Earth was later found, by the court of appeals, to lack standing to sue (Pet. App. 25-26). "R." refers to the Clerk's Record filed in the court of appeals.

District Court for the Northern District of California.[5] The complaint as amended alleged that the Sierra Club represented, *inter alia*, members who used the waters of the Delta for recreational purposes, and that plaintiffs Schramm and Dixon owned or operated businesses in the Delta, a commercial fishing venture and a duck club, respectively (A. 14a-15a).[6] It further alleged that present diversions of waters from the Sacramento River and the Delta effected by the Tracy and Delta Pumping Plants have degraded water quality in the Delta and San Francisco Bay, and that proposed future diversions by the Peripheral Canal would further degrade the water quality there (A. 16a-18a). This degradation in water quality was alleged to have adverse effects upon wildlife, fisheries, and recreation (*ibid.*). Plaintiffs contended that the existing and proposed diversions violated or would violate, various statutes, including Sections 9 and 10 of the Rivers and Harbors Act of 1899 (the "1899 Act"), 33 U.S.C. 401 and 403, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (A. 23a-28a, 33a-37a).

Plaintiffs sought a judgment declaring that the defendants had not complied with applicable statutes and enjoining further operation or construction of the water diversion facilities until such time as the defendants satisfied all legal requirements (A. 45a-48a). Compliance with the law was alleged to require, *inter alia*, (1) that the State and the Bureau of Reclamation refrain from operating the pumping plants at issue until both the consent of Congress and the approval of the Secretary of the Army and the Chief of Engineers were obtained for those operations and (2) that the Secretary of the

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[5] The federal defendants were the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, the Secretary of the Army, the Chief of Engineers of the Army Corps of Engineers, and the Division Engineer of the Corps' South Pacific Division (Pet. App. 68).

[6] "A." refers to the joint appendix to the briefs filed in this Court.

Army and the Chief of Engineers not give such approval until they had been furnished with certain reports from the Secretary of the Interior concerning the effects of the water diversion on fish and wildlife and other features of the natural environment (*ibid.*).

In response to the complaint, the federal defendants asserted, *inter alia*, that the operations of the Tracy Pumping Plant did not violate Sections 9 and 10 of the 1899 Act or NEPA (A. 78a, 79a). With regard to the Peripheral Canal, the federal defendants argued that any ruling on this issue would be premature because the Secretary of the Interior had not yet submitted any feasibility report concerning the project to Congress and that any such feasibility report would be accompanied by an adequate environmental impact statement (EIS) (A. 75a-77a, 81a).[7] In its answer (A. 50a-69a), the State denied that the operation of its facilities violated any laws. Subsequently, the district court entered orders permitting the Tulare Lake Basin Water Storage District, the Kern County Water Agency, the Metropolitan Water District of Southern California and the Santa Clara Valley Water District (the Water Agency petitioners) to intervene as defendants (Pet. App. 6 n.3). The Kern County Water Agency and the Metropolitan Water District of Southern California were the primary purchasers of water pumped through the State's Delta Pumping Plant, contracting, respectively, for the purchase of more than 1.1 million acre feet and 2 million acre feet of water annually (A. 90a).

Following a trial on the merits, the district court entered findings of fact and conclusions of law (Pet. App. 63-129).[8] First, the court held that private persons are

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[7] Section 9(a) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(a), provides that authorization for a federal reclamation project is automatically obtained when the Secretary of the Interior finds it to be feasible and submits a favorable feasibility report to the President and to Congress.

[8] The court designated this the liability phase of a bifurcated proceeding (Pet. App. 64), but no trial constituting the "relief

entitled to bring actions seeking to enforce Sections 9 and 10 of the 1899 Act (*id.* at 72-80).[9] Second, the court ruled that the Peripheral Canal, if constructed, would require permits from the Secretary of the Army through the Corps of Engineers, pursuant to Sections 9 and 10 of the 1899 Act (*id.* at 81-83, 91-93). Third the court found that the pumping of the Tracy and Delta Pumping Plants caused net flow reversals and lowering of water levels in Delta waters, thereby reducing their navigable capacity (*id.* at 88-93); and it concluded that the federal and state defendants had thus violated Section 10 of the 1899 Act by failing to obtain permits for such diversions from the Secretary of the Army (*id.* at 84-88, 93-104). Finally, the court held that any Section 9 or 10 permit issued by the Corps must be preceded by an adequate EIS (*id.* at 108-121). Plaintiffs' remaining causes of action were dismissed (*id.* at 129).

An order granting injunctive relief was entered on December 18, 1975 (R. 1078-1081). The order directed the federal and state defendants to obtain, within a prescribed period of time, Section 10 authorization to operate the Tracy and Delta Pumping Plants, and it required that any such permit be preceded by an EIS (Pet. App. 6; R. 1079-1080).[10] The court further directed that no work on the Peripheral Canal may be commenced until Section 9 and 10 permits are obtained and that any such

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phase" (*ibid.*) was ever held. Hence plaintiffs never established any particularized damages resulting from the legal violations found (see Pet. App. 24 n.19).

[9] Before trial the court had orally denied the federal defendants' motion to dismiss (R. 55) without prejudice to renew; following trial on the merits the federal defendants renewed the motion, arguing *inter alia*, that the 1899 Act conferred no private right of action.

[10] We are advised by the Sacramento District of the Corps of Engineers that, although the State takes the position that Section 10 does not apply to its Delta Pumping Plant, the State, as a precautionary measure, filed an application for a Section 10 permit on October 21, 1975. The Corps has been processing the application and has published the final EIS on the permit application. 45 Fed. Reg. 58959 (1980).

permits must be preceded by preparation of an adequate EIS (Pet. App. 6; R. 1080-1081). All of the defendants appealed from this order.[11]

3. The court of appeals (Pet. App. 5-62) affirmed in part and reversed in part. First, although finding "no hard and precise indication of a congressional intent to create or deny a private remedy" under Section 10 of the 1899 Act (Pet. App. 12), the court concluded (*id.* at 22), that "private parties who suffer special injuries because of unauthorized activities affecting the navigable capacity of our Nation's waters may sue to enforce the permit requirements of [S]ection 10." In so holding, the court found that the plaintiffs below are members of a class for whose especial benefit Congress had enacted Section 10 (*id.* at 12-14) and that implication of a private remedy is both consistent with the purposes of the Act and complementary to its enforcement (*id.* at 18-20). The court acknowledged (*id.* at 15-16) that Section 12 of the 1899 Act, 33 U.S.C. 406, in conjunction with Section 17, 33 U.S.C. 413, expressly placed the duty of enforcing the statute upon the Attorney General and the Department of Justice and that normally such express statutory provisions would imply that no other means of enforcement are intended by Congress. The court concluded, however (Pet. App. 16-17) that this customary rule of construction was inapplicable to the 1899 Act because this Court has consistently construed the Act's language in a manner aimed at effectuating the underlying statutory policies.

Second, the court of appeals ruled that the Sierra Club and the individual plaintiffs had standing to maintain this action (Pet. App. 23-25). The court further ruled, however (*id.* at 25-26), that plaintiff Friends of the Earth had failed to make the requisite showing of injury to any of its individual members. Accordingly, the court directed the district court to dismiss the complaint as to Friends of the Earth (*ibid.*).

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[11] None of the appellants attacked the district court's holdings with respect to the Peripheral Canal.

Third, the court of appeals affirmed the ultimate holding of the district court that Section 10 applied to the pumping operations at issue (Pet. App. 26-33). While it did not reverse the district court's findings that the operations produced obstructions to the navigable capacity of Delta waters, in violation of the first and third clauses of Section 10, it declined to rest its holding as to the application of Section 10 upon them. Instead, stating that "the facts in this case should be analyzed from the standpoint of whether there has been any modification or alteration of the condition or capacity of a navigable stream, rather than first determining whether there has been an obstruction to navigable capacity" (*id.* at 28), the court concluded (*id.* at 39) that the district court's finding that the pumping operations altered the condition of the navigable waters in the Delta was sufficient to bring those operations within the third clause of Section 10, which makes it unlawful, without authorization from the Secretary of the Army, "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of * * * the channel of any navigable water of the United States * * *." The court of appeals rejected (Pet. App. 33-39) the argument, made by the State and the intervenor-defendants, that various other federal statutes, primarily in the area of reclamation, which contain generalized statements announcing a congressional policy of federal noninterference in state water laws or with state water rights, released the State from compliance with the specific requirements of Section 10.

Fourth, the court of appeals reversed the district court with respect to the operations of the federal Tracy Pumping Plant (Pet. App. 39-49), finding that those works had been affirmatively authorized by Congress and were thus exempt from the requirements of Section 10.

The court of appeals agreed (Pet. App. 50-51) with the district court, however, in its rejection of the State's argument that a Section 10 permit issued by the Corps for the cutting of a levee to facilitate the construction

of an inlet control structure for Clifton Court Forebay constituted an authorization of the Delta pumping plant in its entirety. The court of appeals also agreed (*id.* at 51-52) that a Federal Power Commission license for portions of the SWP did not exempt those facilities from Section 10 requirements.

Finally, noting that current regulations of the Corps of Engineers exempted structures completed before December 18, 1968, from the permit requirements of Section 10, where the works do not interfere with navigation, the court (Pet. App. 53-54) remanded the case to the district court for a determination whether the State's facilities are exempt under the regulation and, if so, whether such regulatory exemptions are permissible under the 1899 Act.

SUMMARY OF ARGUMENT

I

1. The question whether the Rivers and Harbors Act of 1899 includes an implied right of action enabling private parties to seek civil enforcement of Section 10 of the Act is purely a question of legislative intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). This Court has identified four factors as indicative of legislative intent in this context. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). It has cautioned, however, that they are not of equal weight. *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575-576, 578.

In this case, the critical first two *Cort* v. *Ash* factors reveal that Congress did not intend to include a private remedy in the 1899 Act, and it is thus irrelevant whether, applying the last two factors, a court might deem a private remedy a useful adjunct to the federal scheme or consider the subject matter to be traditionally one of concern to the states.

2. First, rather than representing a statute enacted for the benefit of a special class, the 1899 Act is a classic

example of a statute enacted for the benefit of the public at large; and this Court has been generally reluctant to find a private right of action implied in such a statute. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-691 & n.13 (1979).

Second, the intent of Congress to preclude enforcement of Section 10 by private parties is revealed in the Act's express enforcement provisions, which state that the Department of Justice shall conduct the legal proceedings to enforce the statute (33 U.S.C. 413) and which specifically authorize the Attorney General to bring proceedings for injunctive relief to enforce Section 10 and other provisions (33 U.S.C. 406). This evidence of intent is reinforced by legislative history: for example, in a predecessor bill, Congress considered a provision that would allow suits by private parties to recover penalties for violations of the statute, but that provision was dropped and was not included in either the Rivers and Harbors Act of 1890, upon which the 1899 Act was based, or in the 1899 Act itself.

The court of appeals acknowledged that the enforcement provisions of the 1899 Act are couched in language that would normally indicate an intent to deny a private remedy, and it found in the legislative history no distinct indication of an intent either to create or to deny a private remedy. It implied a private right of action because it felt bound to read the Act broadly in order to effectuate its purposes, and because, in the court's view, permitting suits such as this would be useful. Such an analysis is incorrect under this Court's precedents concerning implied rights of action, and the faulty analysis has led to an incorrect conclusion.

II

1. It is generally agreed that the power of the states to determine water rights and uses within their borders is limited by a paramount federal power to ensure the navigability of the navigable waters of the United States.

Section 10 of the 1899 Act was enacted in the exercise of that federal power. The first clause generally proscribes unreasonable obstructions to navigable capacity unless the consent of Congress is obtained. The second and third clauses describe certain structures and types of activities in or affecting navigable waters that cannot be undertaken without the permission of the Secretary of the Army, acting on the recommendation of the Chief of Engineers. In cases coming within these second and third clauses, it is for the Secretary, acting through the Corps of Engineers, to determine whether the structure or activity would constitute an unreasonable obstruction to navigable capacity requiring congressional consent.

Notwithstanding the fact that the Delta pumping plant comes within the literal terms of Clause 3, *i.e.*, that its operations "alter or modify the * * * condition or capacity of * * * the channel of [a] navigable water," petitioners contend that it does not require a permit from the Secretary of the Army. Only where there is a substantial impairment of actual navigation, they assert, can Section 10 apply to any component of a state water allocation system operating pursuant to state law. This confuses the standard for determining when an operation may be enjoined for lack of congressional consent (which requires a showing of substantial impairment of navigable capacity), with the standard for determining when the Secretary of the Army, in the exercise of his permit jurisdiction under the second and third clauses, must review a project so as to ensure that it does not have effects that would make it unlawful for lack of congressional consent. Decisions of this Court on which petitioners rely for their standard involve injunctions against activities, including water diversions, which are unlawful per se under the first clause because they amount to an obstruction of navigable capacity requiring the consent of Congress. Those same cases refute the separate and broader contention of the State that states are not covered by the 1899 Act at all.

2. In making their argument that the 1899 Act has only limited application to state water allocation schemes, petitioners rely on provisions in other statutes in which Congress has either (1) indicated its recognition that states are at liberty to define water rights however they wish, *e.g.*, by adhering to the common law riparian rights doctrine or by adopting the doctrine of prior appropriation or (2) stated an intent not to allow the terms of the statute in question to interfere with existing state control of water rights. These provisions are not, however, inconsistent with application of the 1899 Act to water diversions made pursuant to state water allocation programs. States are free to make basic water allocation decisions, so long as they do not produce unreasonable obstructions to the navigable capacity of waters and so long as they secure a permit from the Secretary of the Army to whom Congress has given the responsibility of determining whether activities affecting the condition of navigable waters threaten to create such obstructions.

Of course, some alterations of the condition of navigable waters may be so minimal as not even to require scrutiny by the Corps under Section 10, but where, as here, it is conceded that the alterations have an impact on navigable capacity, it is unnecessary to determine whether the terms of the clause may be enforced to their literal limit.

3. Petitioners' argument amounts to a request that this Court modify the scheme clearly set out in Section 10 of the 1899 Act so as to limit its application where states are concerned. It does not draw support from preemption cases involving other areas of law, for none of those holds that a state may authorize what is clearly forbidden by a statute. Moreover, the argument is contrary to the familiar rule of construction that repeals by implication are not favored; and this rule is especially compelling where, as in the case of the 1899 Act, Congress has subsequently acted in several instances to limit the application of Section 10 and has done so in express terms.

ARGUMENT

I. THE RIVERS AND HARBORS ACT OF 1899 DOES NOT INCLUDE AN IMPLIED RIGHT OF ACTION ENABLING PRIVATE PARTIES TO SEEK CIVIL ENFORCEMENT OF SECTION 10 OF THE ACT

A. Whether Such a Right Exists is Solely a Question of Legislative Intent

The question whether a statutory cause of action exists is one of statutory construction, whether the action is said to be created expressly by a statute or created by statutory implication. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). This Court has identified four factors as relevant to a determination whether, in the case of a statute that does not expressly so provide, a cause of action in favor of private parties predicated on a violation of the statute may be implied. *Cannon* v. *University of Chicago, supra*, 441 U.S. at 688, citing *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Briefly, those factors are (1) whether the plaintiffs come within a class of persons for whose special benefit the statute was enacted; (2) whether there is any express or implicit indication of congressional intent to create or deny such a cause of action; (3) whether the existence of a right to bring such action would be consistent with the purposes of the legislative scheme; and (4) whether the cause of action involves a matter essentially of concern to the states and is traditionally relegated to state law, so that it would be inappropriate to infer a federal cause of action. *Cort* v. *Ash, supra*, 422 U.S. at 78.

Because the essential question is what Congress intended, the factors are not of equal significance, however. As this Court has recently had occasion to note (*Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 15-16; *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575-576, 578), where the language and legislative his-

tory of a statute indicate that Congress did not intend to create a private remedy, it is irrelevant whether a court might deem a private remedy a useful adjunct to the legislative scheme or whether the subject matter of the action is not one traditionally of concern to the states.

B. The Enforcement Provisions of the 1899 Act Evidence an Intent to Commit Enforcement of the Statute Exclusively to the United States

1. Analysis of the language and legislative history of the Rivers and Harbors Act of 1899 reveals that Congress did not intend to create a federal cause of action in favor of private parties under Section 10 of the Act, 33 U.S.C. 403.

We begin with the statutory language. *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 568; *Cannon* v. *University of Chicago, supra*, 441 U.S. at 689. Section 10 of the 1899 Act prohibits obstructions to the navigable capacity of waters of the United States without congressional authorization and prohibits the construction of certain types of structures in those waters or any excavation, filling, or other alteration of "their course, location, condition or capacity" without the authorization of the Secretary of the Army on the recommendation of the Chief of Engineers. In Sections 12 and 17 of the Act, 33 U.S.C. 406 and 413, Congress specified the means of enforcing Section 10. Section 12 sets out criminal penalties for those who violate the terms of Section 10, and it also provides that "the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States." Section 17 provides that the "Department of Justice shall conduct the legal proceedings to enforce the provisions" of the various prohibitory sections of the 1899 Act. Section 10 of the Act, 33 U.S.C. 403, is one of those specified sections.

Where a statute thus contains a specific provision governing its enforcement and does not provide for enforcement by private parties, it may be presumed that Congress intended to exclude private remedies. *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419-420 (1975); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Accordingly, here we may at least preliminarily conclude that in the 1899 Act, Congress intended to create a public cause of action enforceable by the Department of Justice but not by private parties such as plaintiffs in this suit.

This presumption, of course, will yield to "clear contrary evidence of legislative intent" (*National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers, supra*, 414 U.S. at 458), but such evidence is absent here. Indeed, if anything, the legislative history of the 1899 Act discloses a congressional intent to deny a private right of action.

The provisions of the 1899 Act dealing with obstructions derive ultimately from a proposal made by the Chief of Engineers and transmitted to Congress by the Secretary of War in 1877. See, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 499-500 (1960) (Harlan, J., dissenting). Bills based on this recommendation were repeatedly introduced and reported favorably in the years prior to 1890, but they failed to pass both chambers. In 1888, during the first session of the 50th Congress, S. 2 was the navigable waters bill pending before Congress, and Section 2 of that bill contained a provision substantially similar to the text of Section 10 of the 1899 Act. The enforcement provision in the bill, Section 5, originally provided as follows:

> Sec. 5. That every person, persons, or corporation offending against the provisions of this act shall, for each and every such offense, forfeit and pay a penalty of $250 besides such other sum as may be found in any action for the recovery of the penalty or

> penalties incurred under this act to be the expense of making good the damage incurred or the removing to a proper place the thing deposited in violation of this act, such penalties to be recoverable by and in the name of the United States of America, with costs, in any circuit or district court of the United States, at the suit of any district attorney of the United States, *or at the suit of any person*, by information to any district attorney in any district where or near to where the offense shall have been committed or the offender shall be. [Emphasis added.]

On March 22, 1888, however, the Senate amended Section 5 by deleting the language extending from "such penalties to be recoverable" to the end of the Section and substituting in its place language that omitted the reference to enforcement "at the suit of any person." The clause then read: "such penalties to be recovered in the name of the United States in any district court within whose jurisdiction such offense shall be committed, said action to be instituted by the district attorney for such district at the instance of any person complaining." 19 Cong. Rec. 2338 (1888). Although S. 27 was not enacted, no attempt was made in subsequent sessions to restore language authorizing private suits; instead the only express enforcement provisions in the 1899 Act provided that the Act is to be enforced by the Department of Justice.

The court of appeals (Pet. App. 15 n.9) sought to explain this history as merely evidencing the rejection by Congress of a scheme for permitting private enforcement of the *penal* provisions of the legislation, and asserted that it shed no light on congressional intent respecting private *civil* actions. But contemporary practice shows that when congressional draftsmen wished to provide for private enforcement of some kind, they did so by express provisions. Thus Section 2 of the Rivers and Harbors Act of 1888, ch. 860, 25 Stat. 423 (now codified at 33 U.S.C. 500), provided that those who owned or

operated bridges with piers or abutments that, according to the finding of the Secretary of the Army, deflected the current in a manner that produced "caving of banks or otherwise serious damage or danger to property" would be required to repair the damage or prevent the danger to property according to the Secretary's directions, and it further provided that if they did not do so, "the owners or persons operating such bridge shall be liable in any court of competent jurisdiction to the persons injured in a sum double the amount of said injury." [12]

As both the rejected provision in S. 27, 50th Cong., 1st Sess. (1888), and the enacted provision now codified at 33 U.S.C. 500 reveal, when Congress wished to create rights of action in private parties, it knew how to do so. Its failure to provide expressly for a private action such as the suit brought by plaintiffs here is thus strong evidence that it had no intent to create such a cause of action. See *Touche Ross & Co.* v. *Redington, supra,* 442 U.S. at 572; *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 734 (1975).

C. The Statute was Designed to Benefit the Public at Large, Not Members of Any Special Class

Another telling point concerning the language of the 1899 Act, and Section 10 in particular, is the absence of any language "describing [a] special class to be benefited." *Cannon* v. *University of Chicago, supra,* 441 U.S. at 690. The absence of such language distinguishes this

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[12] This section also provides that "nothing herein contained shall be construed so as to affect any rights of action which may have existed prior to August 11, 1888," thereby expressly preserving any private civil remedies not dependent on a federal statute.

This section was one of "the general laws relating to mainteance, preservation and protection of navigable waters of the United States" that was included in a compilation forwarded to Congress in a letter from the Secretary of War in 1397. H.R. Doc. No. 293, 54th Cong., 2d Sess. 1, 2-3 (1897). See *United States* v. *Republic Steel Corp., supra,* 362 U.S. at 486, describing the close relation of this document to the 1899 Act.

case from cases such as *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), in which, as the Court noted in *Cannon* (441 U.S. at 690), the "dispositive language" in the statute at issue stated that "no person" should be denied the right to vote for failure to comply with certain types of unapproved state enactments. *Cannon* itself is also distinguishable in that the statute involved there similarly focused upon individuals whom Congress sought to protect from discrimination on the basis of sex. By contrast, as this Court noted in *Cannon* (441 U.S. at 691 n.13), the 1899 Act is a statute that "creates a duty in favor of the public at large." See also *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201 (1967) (government is "a principal beneficiary of the Act, if not the principal beneficiary").

Not only does the 1899 Act contain no language singling out a special class of intended beneficiaries, it expressly creates a scheme under which the interests of private individuals may be sacrificed in favor of the common good. Thus, in the second and third clauses, of Section 10, Congress conferred authority on the Secretary of ~~Army~~ War to permit certain structures and activities which, in his view, did not constitute "unreasonable obstructions" to navigable capacity, *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1929). There is no indication in either the legislative history of the 1899 Act or in cases construing it that the Secretary is bound to consider the interests of particular individuals in determining whether an obstruction is "unreasonable," so long as the interest of the general public warrants the grant of a permit. Given the language and structure of the Act, the court of appeals thus erred in concluding (Pet. App. 12-14) that private parties are intended beneficiaries of the Act.

To be sure, as the court of appeals noted (Pet. App. 12-13), Section 10 of the 1899 Act, and its immediate predecessor, Section 10 of the Rivers and Harbors Act of

1890, ch. 907, 26 Stat. 454,[13] were enacted, at least in part, in response to the decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1888),[14] an action between private parties in which this Court held that, in the absence of relevant statutes, there was no federal remedy which would allow a private party to compel removal of obstacles to navigation. It does not, however, follow that because *Williamette* was a private action, Congress intended that the 1899 Act should be directly enforceable in the courts by private parties.

Rather, the most disturbing aspect of *Willamette* was the clear implication that the federal government itself had no basis in existing law by which it could prevent or compel the removal of obstacles to navigation. As Senator Edmunds remarked in discussing the Judiciary Committee's response to *Willamette* (21 Cong. Rec. 8607 (1890) (emphasis added)) "the [C]ourt has said if [a bridge] is not affirmatively authorized or condemned by law there is *nobody* who can punish that company for obstructing the river." And as Senator Spooner thereafter recounted (*ibid.*), an attempt he had made "to apply to the War Department for some relief against obstructions at the head of Lake Superior which were to the great disadvantage of the Government," came to naught because he was "advised that there was no power under the law in the Government to prevent them." Thus, although the debate on the 1890 Act indicates that Con-

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[13] Because of the close relationship between the 1890 and 1899 Acts, this Court has frequently relied on the 1890 Act and its legislative history as an aid in interpreting the 1899 Act. *United States* v. *Pennsylvania Chem. Corp.*, 411 U.S. 655, 663-664 (1973); *United States* v. *Standard Oil Co.*, 384 U.S. 224, 227-228 (1966); *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 486-488.

[14] In fact, legislative proposals embodying provisions similar to those adopted in the 1890 Act were under active consideration by Congress for several years prior to the date of the *Willamette* decision. See *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 499-500 (Harlan, J., dissenting).

gress was aware that individual groups of citizens had on rare occasions attempted, usually without success to enjoin obstructions, and were unable to obtain the aid of federal authorities because those authorities had no law under which to proceed (21 Cong. Rec. 8603 (1890) (remarks of Sen. Vest)), there is no suggestion that the enforcement of the 1890 Act, and by extension the 1899 Act, was conceived as being entrusted to private parties as well as to the federal government.

D. The Court of Appeals Erroneously Relied on Its Own View of How the Statutory Scheme Might Best Be Enforced

We submit, therefore, that the intent of Congress as expressed in the language and the legislative history of the 1899 Act is inconsistent with an implied private right of action, and that none of the grounds relied on by the court of appeals justifies its contrary holding. The court in fact acknowledged that it found "no hard and precise indication of a congressional intent to create or deny a private remedy under Section 10" (Pet. App. 12) and that "[n]ormally * * * express statutory enforcement provisions [like Section 12 and 17, 33 U.S.C. 406 and 413] would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut this presumption" (Pet. App. 16). The court of appeals sought to evade the logical result of this principle by invoking this Court's consistent construction of "the Act's language in a manner apparently aimed toward effectuating the underlying statutory policies," that a private right of action would be consistent with the purposes of the 1899 Act "and complementary to its enforcement" (*id.* at 16-17, 18-20). But the two principal cases cited in support of these arguments (*Wyandotte Transportation Co.* v. *United States*, *supra*, 389 U.S. at 201; *United States* v. *Republic Steel Corp.*, *supra*), were cases in which remedies in suits brought by the government were found in the 1899 Act by implication. Moreover, the court of appeals' reasoning does not

reflect recent decisions of this Court which suggest that specific indications in a statutes's language and legislative history of a congressional intent to preclude a particular remedy cannot be overcome by finding that such a remedy might serve the general purposes of the statute.[15]

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[15] In any event, we do not concede that permitting private enforcement of the 1899 Act necessarily effectuates the legislative scheme. By resorting to litigation without even having asked the Corps to investigate the effect of the pumping at issue on the navigable capacity of Delta waters, plaintiffs induced the district court to decide, *in the first instance*, whether the pumping activities had such an effect on navigable waters as to require permits. When, in cases unlike this suit, the Corps is effectively required by district court orders to process permit applications relating to activities that, in the view of the Corps, have an insignificant effect on navigable waters, the Corps' resources may well be diverted from processing and monitoring permits for activities with more severe effects on navigation and navigable capacity. It is doubtful whether Congress intended for the courts to dictate the government's administrative and enforcement priorities in this manner.

Moreover, although the district court did not finally enjoin the operation of the pumping plants pending the issuance of a Section 10 permit, nothing in its reasoning (Pet. App. 72-80) or in that of the court of appeals (*id.* at 11-22) would preclude courts from granting such relief to private parties. And the availability of such relief at the behest of private parties could have the same ill effects on the administration of Section 10 of the 1899 Act as the Second Circuit, in *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (1972), perceived with respect to Section 13 of the Act. In ordering dismissal of that suit brought to enforce Section 13, the court observed (457 F.2d at 89):

> The clear congressional purpose, it seems to us, was to concentrate at least this type of public and general enforcement in the Department. If both the Attorney General and private individuals could institute enforcement proceedings, there would only be a difference of degree, between criminal prosecutions and civil injunction suits in the possibilities of conflict and disruption. A careful federal decision not to seek an injunction because of some general policy, or in view of other means of ending or alleviating the discharge, could be upset by any individual who thought he understood better the needs of the public. We doubt that the 1899 Congress, when it enacted § 413, envisaged that the theory of participatory democracy would be carried so far.

Similarly, regardless whether the court of appeals was correct in concluding (Pet. App. 20-21) that the fourth *Cort* v. *Ash* factor favors the implication of a private cause of action, *i.e.*, "that this case is not the type of action traditionally relegated to state law," the evidence of congressional intent that we have outlined above precludes consideration of the matter.

E. The Lower Courts Generally Agree that Section 13 of the 1899 Act Is Not Enforceable by Private Parties, and Section 10 Should Be Treated No Differently

Nearly all of the courts to have considered the question agree that no private cause of action exists to enforce Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, which generally prohibits the deposit of refuse in navigable waters. See, *e.g.*, *National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222, 1232 (3d Cir.), cert. granted, No. 79-1760 (Oct. 20, 1980); *City of Evansville, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1011-1012 (7th Cir. 1979); *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81, 89 (2d Cir. 1972); *Barcelo* v. *Brown*, 478 F. Supp. 646, 671 (D.P.R. 1979).[16] The courts are in conflict with regard to Section 10 of the 1899 Act (compare, *e.g.*, the decision below; *Norfolk & Western Co.* v. *United States*, No. 78-3271 (6th Cir. Oct. 21, 1980), slip op. 19-21; *Tatum* v. *Blackstock*, 319 F.2d 397 (5th Cir. 1963); *River* v. *Richmond Metropolitan Authority*, 359 F. Supp. 611, 639 (E.D. Va.), aff'd per curiam, 481 F.2d 1280 (4th Cir. 1973); *Citizens Committee for the Hudson Valley* v. *Volpe*, 302 F. Supp. 1083, 1087-1090 (S.D.N.Y. 1969), aff'd, 425 F.2d 97 (2d Cir.), cert.

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[16] The Fifth Circuit would permit civil enforcement of Section 13 of the 1899 Act in cases in which "defendants' conduct constituted an interference with navigation by which plaintiffs were injured." *Guthrie* v. *Alabama By-Products Co.*, 456 F.2d 1294, 1295 (5th Cir. 1972). As the court in *Barcelo* v. *Brown*, *supra*, notes (478 F. Supp. at 671 & n.52), the position of the Fourth Circuit is unclear.

denied, 400 U.S. 949 (1970). *Red Star Towing and Transportation Co.* v. *Dep't of Transportation of New Jersey*, 423 F.2d 104, 105 (3d Cir. 1970); *Loveladies Property Owners Ass'n Inc.* v. *Raab*, 430 F. Supp. 276, 281 (D.N.J. 1975), aff'd, 547 F.2d 1162 (3d Cir. 1976); *Hooper* v. *United States*, 331 F. Supp. 1056, 1058 (D. Conn. 1971); *Cross* v. *Pace*, 106 F. Supp. 484, 488 (D.D.C. 1952).[17] For the reasons we have set out above

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[17] We do not agree with the court of appeals (Pet. App. 14 n.8) that *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929), "standing alone, might constitute adequate authority for allowing others beside the federal government to enforce the requirements of the Rivers and Harbors Act." That suit by Wisconsin and other states to enjoin excessive diversions of water from Lake Michigan and the dumping of sewage into certain waterways was not dependent on the 1899 Act for a cause of action. The Court was required to construe the 1899 Act in that case because defendants sought to raise certain permits issued to them under the Act as a defense to the bill of complaint.

In the line of cases exemplified by *Tatum* v. *Blackstock*, *supra*, the courts have held that a private party suffering special injury from obstructions in navigable waters may, where those obstructions violate Sections 9 or 10 of the 1899 Act, sue in federal court for equitable relief, the action being viewed as one invoking the court's federal question jurisdiction. See, *e.g.*, *Neches Canal Co.* v. *Miller & Vidor Lumber Co.*, 24 F.2d 763 (5th Cir. 1928); *River* v. *Richmond Metropolitan Authority*, 359 F. Supp. 611 (E.D. Va.), aff'd per curiam, 481 F.2d 1280 (4th Cir. 1973) (noting that questions of standing or jurisdiction were not raised by parties to the appeal); *Silvey* v. *Commissioners of Montgomery County, Ohio*, 273 F. 202 (S.D. Ohio 1921); *Carver* v. *San Pedro, L.A. & S.L.R. Co.*, 151 F. 334 (S.D. Cal. 1906); *E.A. Chatfield Co.* v. *City of New Haven*, 110 F. 788 (D. Conn. 1901). See also *Lownsdale* v. *Gray's Harbor Boom Co.*, 117 F. 983 (W.D. Wash. 1902) (finding subject matter of such a suit within the court's equitable jurisdiction if diversity were shown, but doubtful whether it would find federal question jurisdiction). We disagree with those cases because we believe they misread the intent of Congress in the 1899 Act; but in any event plaintiffs have not alleged the type of special damage required to make out a cause of action under those cases nor, even assuming the allegations were adequate, have they established proof of special damage sufficient to entitle them to equitable relief.

(pages 15-24, *supra*), we submit that congressional intent concerning the proper party to enforce the 1899 Act is the same with respect to Section 10 as it is with respect to Section 13. Judicial enforcement of the Act was confided to the United States acting through the Attorney General, and not to private parties. Accordingly, plaintiffs had no basis for bringing this action, and it should be remanded to the district court with directions to dismiss the complaint.[18]

II. SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 APPLIES TO A STATE WATER ALLOCATION PROJECT THAT DIVERTS WATER FROM A NAVIGABLE CHANNEL WHERE THE DIVERSION ALTERS OR MODIFIES THE COURSE, LOCATION, CONDITION, OR CAPACITY OF THE CHANNEL

It is common ground in this case (see State Br. 24-25; Kern Br. 30) that the prerogative of the states to determine water rights and uses within their borders is limited by the "superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the United States." *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). Accord, *California* v. *United States*, 438 U.S. 645, 662 (1978); *Kansas* v. *Colorado*, 206 U.S. 46, 86, 117-118 (1907). Section 10 of the Rivers and Harbors Act of 1899 was enacted pursuant to that power, and as the State concedes (State Br. 15), it has "a very broad reach."

Nevertheless, it is argued that Section 10 does not reach the State project at issue. In answering that contention, we first examine the scope of the provision as it

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[18] Because the Secretary of the Army has not yet acted upon the State's permit application, there is at present no final administrative action which could be subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 706. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-319 (1979).

controls non-governmental activity and then address the suggestion that Section 10 exempts State projects or regulates them in a lesser way.

A. The Operation of the Pumping Station Comes Within Clause 3 of Section 10

1. The first clause of Section 10 of the 1899 Act is a general prohibition against "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States"; the second clause makes it unlawful to build certain types of structures in waters of the United States outside established harbor lines "except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army"; and the third clause, in pertinent part makes it "unlawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of * * * the channel of any navigable water of the United States unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to the beginning of same." This Court has construed this section as prohibiting, in its first clause, any "unreasonable obstructions" to navigable capacity and as specifying in the second and third clauses certain types of works which may not be undertaken until the Secretary of the Army (originally the Secretary of War) acting through the Corps of Engineers has considered them and determined whether they fall outside the class of unreasonable obstructions generally prohibited by the first clause. *Wisconsin* v. *Illinois*, 278 U.S. 367, 412-413 (1929). See also *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 486-487 (1960). If they do not constitute unreasonable obstructions, then the Secretary of the Army may permit them.[19]

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[19] The Secretary of the Army may deny a permit on grounds other than the effect of a Clause 2 structure or a Clause 3 activity on navigable capacity (*United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352 (1933); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971); but the existence of such other

Thus, in a lecture delivered to the Company Officers Class of the Engineer School at Fort Humphreys, Va., in 1926, Judge G. W. Koonce of the Corps, who had been instrumental in drafting the 1899 Act explained its provisions in the following terms:

> [The first clause] can * * * be invoked to prevent the doing of things on unnavigable streams, the effect of which would impair the navigable capacity of a navigable stream. * * * [And early in the administration of the 1899 Act], the Chief of Engineers maintained: That the essence of the whole section is contained in the first clause, the obvious purpose of which is to prevent the execution of any work or the doing of any act that will obstruct, injure or destroy the navigable capacity of any navigable water unless expressly authorized by Congress—
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> That the succeeding clause[s] making it unlawful to build any structure, or to modify the condition or capacity of a navigable water, without the prior recommendation of the Chief of Engineers and authorization of the Secretary of War, was intended to insure the accomplishment of the aforesaid purpose, and not to empower them to authorize obstructive works: —that the effect of this latter clause is to necessitate the submission of every project of the kind to the Chief of Engineers and the Secretary of War, and to commit to them the duty of investigat-

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grounds (e.g. adverse effects on the environment apart from navigable waters) does not control the threshhold determination whether a particular structure or activity comes within the terms of the second or third clause of Section 10 and thus requires the Secretary's approval before it may be undertaken.

Under current law, before granting a Section 10 permit, the Corps must consult with the Department of the Interior's Fish and Wildlife Service to determine the effect on fish and wildlife of a project for which a permit is sought (Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*), and must formally assess the environmental effects of the project through the preparation of an Environmental Impact Statement, pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

> ing and determining whether or not the project will obstruct or injure navigability * * *.

G. Koonce, *Federal Laws Affecting River Harbor Works* (1926), *reprinted in Water Pollution Control Legislation —1971 (Oversight of Existing Programs): Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 289 (1971). See also *United States* v. *Joseph G. Moretti, Inc. ("Moretti II")*, 526 F.2d 1306, 1309 (5th Cir. 1976); *Hubbard* v. *Fort*, 188 F. 987 (D.N.J. 1911).

2. The Water Agency petitioners contend (Kern Br. 40-46) that changes in the level and flow characteristics of navigable waters, which they distinguish (*id.* at 41) from changes "in a physical structure enclosing the water" do not trigger the permit requirements imposed by Clause 3 unless there is a showing that those changes unreasonably and substantially impair navigation. Although they link this contention to their arguments concerning the special character of state water allocation systems, it is logically separate, because their construction of the language would necessarily affect the coverage of that clause regardless of the character of the project producing the effects in question and regardless of the identity of the project's sponsor. In our view, the contention is erroneous because it rests on an unnecessarily limited construction of the term "channel" and on a mistaken understanding of the relationship of Clause 3 to Clause 1 of Section 10.

Clause 3 refers in pertinent part to alterations and modifications of "the course, location, condition, or capacity" of certain enumerated bodies of water, including lakes and canals, and of "the channel of any navigable water." If the term "channel" means, as the Water Agency petitioners urge (Kern Br. 41), only the bed of a navigable water, *i.e.*, "the physical structure carrying the water," then the reference to "course" would make little sense. Waters, not streambeds, are properly described as having a course. In any event, in *Oklahoma*

v. *Texas*, 258 U.S. 574, 592-593 (1922), this Court identified the "middle of the main channel" of a navigable stream with "the thread of the navigable current." More importantly, it would be anomalous for Clause 3 to cover alterations in the condition of lakes and canals, without limitation to the "physical structures" enclosing the waters, while imposing that limitation on rivers and streams, and to cover reductions in the capacity of a stream to carry boats caused by, *e.g.*, silting of the streambed, but not equivalent reductions caused by a diversion of the water that actually supports the boats.

A more fundamental flaw in the Water Agency petitioners' construction of Clause 3 is that they confuse the criteria for justifying the denial of a permit with the criteria for triggering an inquiry by the Corps into whether the activity in question should be permitted. As noted above (page 27), Clause 1 prohibits unreasonable obstructions of navigable capacity without the consent of Congress. Clauses 2 and 3 define certain structures and activities that have an impact on navigable capacity and thus call for consideration by the Secretary of the Army, acting through the Corps, to determine whether they threaten an unreasonable obstruction. By arguing (Kern Br. 46) that the Section 10 permit requirements are not triggered by evidence of water diversions unless "those diversions alter flows in a manner that unreasonably and substantially impairs the stream's capacity to support established navigation," the Water Agency petitioners have confused conditions that would justify the denial of a permit with conditions that merely trigger an inquiry into whether a permit should be granted.

United States v. *Rio Grande Dam & Irrigation Co.*, *supra*, is not to the contrary. In that case this Court was applying Section 10 of the 1890 Rivers and Harbors Act, ch. 907, 26 Stat. 454-455, which prohibited "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of

which the United States has jurisdiction," and which authorized the Attorney General to bring an injunctive action against the creation or continuance of such an obstruction. No mention is made of Section 7 of the 1890 Act, ch. 907, 26 Stat. 454, which contained the provision on which Clause 3 of Section 10 of the 1899 Act is based. Since the Attorney General was seeking in *Rio Grande* to enjoin construction of a dam that he asserted was, in effect, an unreasonable obstruction to navigable capacity, the Court properly stated the test for restraining the dam's construction as whether the resulting appropriation of water "substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." *United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, 174 U.S. at 709.

We do not suggest, however, that literally any alteration of the condition or capacity of a navigable water triggers review by the Corps of Engineers. Congress must have contemplated the application of a de minimis standard lest such insubstantial matters as slight increases in surface water runoff produced by the clearing of small plots of land make Corps permission necessary for such minor shore-based activities. We assume, moreover, that an alteration or modification must be of a type with the potential for affecting navigation, *i.e.*, that water quality alterations would not be covered unless they are of a type with the potential for reducing stream capacity, for example, by increasing siltation.[20] The court of ap-

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[20] Current Corps of Engineers regulations generally require a Section 10 permit for structures or work located outside of navigable waters "if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody." 33 C.F.R. 322.3(a)(1). However, the Corps has recently published a notice of proposed rulemaking which, if adopted, would revise the above provision so as to require a Section 10 permit "if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the physical capacity of the waterbody." 45 Fed. Reg. 62732, 62744 (1980).

peals gave Clause 3 a broad reading (Pet. App. 27-28), but it did not clearly reject these limiting principles. In any event, this record does not present the question of broader coverage because the district court found an actual obstruction of navigable capacity; the factual finding was not directly challenged in the court of appeals as "clearly erroneous"; and the State here concedes (State Br. 9, 53) that the finding was correct.

B. Section 10 of the 1899 Act Applies to States As Well As to Individuals and Corporations

The State makes two separate arguments to the effect that, whatever may be the application of Section 10 to private parties, it does not apply at all to a state (State Br. 48-50) or at least not to any state project that is part of a state water allocation system (State Br. 37-39). The latter argument is answered, a fortiori, by our response below to the narrower argument, made by both sets of petitioners, that Section 10 of the Act applies to such projects, but only when they result in substantial impairments to actual navigation.

Because it rests on different reasoning, we briefly address here the State's argument (State Br. 48-50) that regardless of the character of the project concerned, states are not covered by the 1899 Act or at least have a status different from individuals and corporations.

A similar argument was squarely rejected by this Court in *United States* v. *Arizona*, 295 U.S. 174 (1935). There the United States had argued that Section 9 of the Act, 33 U.S.C. 401, and Section 12 of the Act, 33 U.S.C. 406—which is an enforcement provision for Section 9 as well as for Section 10—applied only to private parties, and that a dam to be built by the federal government in a navigable interstate stream as part of a reclamation project therefore did not require proof of congressional approval. This Court gave the argument short shrift, stating (295 U.S. at 184):

> These provisions [Sections 9 and 12 of the 1899 Act] unmistakably disclose definite intention on the part

> of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply only to work undertaken by private parties. But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and state officers. There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others. *Donnelley* v. *United States*, 276 U.S. 505, 516.

Other decisions of this Court also make it clear that Section 10 is not limited to private parties. See *e.g.*, *New Jersey* v. *New York*, 283 U.S. 336, 344-345, 348 (1931); *United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, 174 U.S. at 709 (regarding the predecessor 1890 Act).

Parker v. *Brown*, 317 U.S. 341 (1943), a case construing the Sherman Act, 15 U.S.C. 1 *et seq.*, is hardly authority for the startling proposition that in its attempt to safeguard rivers, Congress did not see fit to make the measures applicable to states. We note moreover, that the State itself apparently assumed that the 1899 Act applied to its activities when it applied in 1967 for a Section 10 permit to cut a levee for Clifton Court Forebay (J.A. 115a-119a).

C. Alterations in the Condition and Capacity of the Delta Waters Produced by the Delta Pumping Station Were Sufficient To Trigger the Permit Requirements of Section 10 of the 1899 Act, Notwithstanding the Station's Function As a Component of a State Water Allocation System

Petitioners lack any basis in the statutory language for their principal argument that Section 10 either does not

apply to state projects for allocating water for reclamation purposes and other uses, or that it applies in an attenuated way that exempts such state projects from permit requirements that would apply to any other type of project. The effect of the Delta Pumping Station on navigable waters (net flow reversals and reductions in water levels) brings it within the terms of Clause 3, as we have shown, and there is no express language limiting the application of Section 10 where state water allocation systems are concerned.

Petitioners rely almost entirely on provisions in other statutes, which, they contend (State Br. 19-36; Kern Br. 27-36), embody a congressional policy of deference to state water rights laws that can be accommodated only by permitting a state to do what is plainly forbidden by the second and third clauses of Section 10 of the 1899 Act, so long as the state's actions can be characterized as part of a state water rights allocation scheme. The cited statutes bear no such construction. Those enacted before passage of the 1890 Act indicate no intent on the part of Congress to forego enacting measures designed to protect the navigability of navigable waters, and those enacted after passage of that Act and of the 1899 Act reveal no intent to make it inapplicable to those structures and activities to which statutory terms clearly apply.

The Mining Act of 1866, ch. 262, 14 Stat. 251, and the Desert Land Act of 1877, ch. 107, 19 Stat. 377, recognized the rights of the states to determine water rights according to the riparian doctrine or the prior-appropriation doctrine or any modification of either or combination of the two. See *California* v. *United States*, 438 U.S. 645 (1978); *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935). But this Court made it clear in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), a case in which the defendant relied on those same 1866 and 1877 statutes, that a state's undoubted power to "change [the] common law [riparian rights] rule and permit the

appropriation of the flowing waters for such purposes as it deems wise" (*id.* at 703),[21] was "limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States" (*ibid.*). As the Court explained (*ibid.*): "[T]he jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take *all needed measures to preserve* the navigability of the navigable water courses of the country even against state action" (emphases added). As explained above (pages 27-29, *supra*), the measures taken by Congress in the 1899 Act to preserve navigability include a system (based on Section 7 of the 1890 Act, ch. 907, 26 Stat. 454) for monitoring appreciable alterations of the condition or capacity of navigable streams to ensure that they will not operate as unreasonable obstructions to navigability.

Even assuming—contrary to the understanding of this Court (*United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 486; *Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 412)—that the 1899 Act included substantive changes and was not just a recompilation of the 1890 Act, the laws passed in 1891 and 1897 on which petitioners rely (State Br. 26-27; Kern Br. 30) do not reflect any relaxed policy against potential threats to navigability where state water diversion schemes were concerned. In the Act of Mar. 3, 1891, ch. 561, 26 Stat. 1101, amending existing laws so as "to reserve reservoir sites [on public lands] from settlement but to open them up for use in reclamation projects" (*California* v. *United States*, *supra*, 438 U.S. at 659), Congress provided that this privilege was not to interfere with existing state authority over "control of water for irrigation and other purposes." 26 Stat. 1102. Nothing in this language, how-

[21] The purposes to be served by the proposed dam in *Rio Grande*, through the diversions of the impounded waters were "irrigation and [the supply of] water for municipal and manufacturing uses * * *." 174 U.S. at 701.

ever, suggests that a state's control of water for such purposes included the right to alter navigable waters in ways that might reduce their navigability. Similarly, the amendment of the 1891 statute, the Act of Feb. 26, 1897, ch. 335, 29 Stat. 599 in 1897,—on which petitioners strongly rely (see State Br. 27-28)—provided that "the charges for water" from reservoir sites on public lands were to be "subject to the control and regulation of the respective States and Territories," but, again, there is no suggestion that this was intended to affect restrictions on state action under the 1890 Rivers and Harbors Act. Indeed, that same amendment provided that "any State is hereby authorized to improve and occupy reservoir sites *to the same extent as an individual or private corporation* * * *." Act of Feb. 26, 1897, ch. 335, 29 Stat. 599 (emphasis added).[22]

Were the statutes enacted after passage of the 1899 Act to be construed as petitioners urge, they would necessarily operate as implicit partial repeals of that statute. It is, however, a familiar rule of statutory construction that repeals by implication are not favored. *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 549-551 (1974). In any event, no such implication is discernable in them.

Petitioners principally rely on Section 8 of the Reclamation Act of 1902, 43 U.S.C. 383, in which, they contend (State Br. 29), "Congress continued and extended the

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[22] The remarks of Congressman Lacey in connection with the 1897 amendment, which are quoted by the State (State Br. 27-28) and by this Court in *California* v. *United States*, *supra*, 438 U.S. at 661-662, do not purport to reflect the government's exercise of power over matters touching on navigability. Congressman Lacey went out of his way to point out that the reservoir waters were "surface waters, the waters of small streams not navigable." 29 Cong. Rec. 1948 (1897). And as this Court has recently noted (*California* v. *United States*, *supra*, 438 U.S. at 662), Congressman Lacey's views concerning state control of interstate waterways were reflected in *United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, in its recognition that only two federal limitations on a state's control of its streams existed, one of them being "the navigation servitude."

principle of state control of water." [23] But again, nothing in the statutory language requires or implies that the section was to operate as a limitation on the construction of the 1899 Act.[24] Indeed, even though Section 8 provides that

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[23] Section 8 of the Reclamation Act of 1902 provides in pertinent part (43 U.S.C. 383) (emphasis added):

> Nothing *in this Act* shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate system or the waters thereof.

[24] The State is also incorrect in its contention (State Br. 51) that Sections 2 and 10 of the Reclamation Act of 1902, 43 U.S.C. 411, 373, which grant certain powers to the Secretary of the Interior, make the 1899 Act inapplicable "to water diversions from reclamation projects built and operated by the federal government." In making this argument the State is attacking the reasoning of the court of appeals, not its judgment; for the court of appeals, agreeing with the argument made below by the federal respondents, concluded (Pet. App. 40-49) that the federal government's Tracy Pumping Plant was authorized by Congress, pursuant to procedures established in subsequent federal reclamation legislation. The State thus errs in asserting (State Br. 51) that "the United States" made the argument below that the State now makes with respect to the Reclamation Act of 1902.

Our views on the basis for concluding that the Tracy Pumping Plant was authorized by Congress are set forth in the federal respondents' opposition to the petition for certiorari filed in No. 79-1625, *Sierra Club et al.* v. *Cecil D. Andrus, et al.*, still pending before the Court. We do not believe the question is properly presented in these consolidated cases, however. "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Accord, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 734 (1978). Had the Court granted the petition in No. 79-1625, the State, of course, could have properly advanced its argument as an alternative ground for supporting the judgment of the court of appeals.

nothing "in this Act" is intended to interfere with state law "relating to the control, appropriation, use, or distribution of water used in irrigation," this Court has held that another provision of the same act (Section 5, 43 U.S.C. 431), which prohibits the sale of a water use right for lands exceeding 160 acres in single ownership, imposes a condition on distribution of water from projects established under the 1902 Act that supersedes any contrary state law. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958). See also *City of Fresno* v. *California*, 372 U.S. 627 (1963) (Section 8 of the Reclamation Act of 1902 no barrier to federal government's exercise of eminent domain powers to acquire water rights in furtherance of Central Valley Project, notwithstanding any interference with priorities for water uses under state law). See generally *California* v. *United States*, *supra*, 438 U.S. at 670-673. If Section 8 did not sanction state laws respecting distribution of water where they conflicted with other provisions of the same act, it surely cannot be read as sanctioning such laws where they conflict with provisions of other statutes, enacted pursuant to different constitutional powers.[25]

It should be stressed that petitioners do not restrict their claim to state laws respecting *reclamation*. They argue that the Act cannot be applied to any water diversions made pursuant to *any* "water allocations" plan

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[25] The State misreads *Kansas* v. *Colorado*, 206 U.S. 46 (1906), when it suggests (State Br. 25 n.12, 13) that by observing that "legislation" of "the National Government" does not "override state laws in respect to the general subject of reclamation" (206 U.S. at 92), the Court held that laws enacted pursuant to the Commerce Clause, as distinguished from the navigation servitude, could never preempt conflicting state laws respecting reclamation. In context, the Court's observation suggests only that the federal government is not generally free to make reclamation laws for the states, *e.g.*, to "enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders." *Ibid.* In the Rivers and Harbors Act of 1899, of course, the United States asserted its "sovereign power to regulate commerce and to control the navigable waters within its jurisdiction." *Sanitary District* v. *United States*, 266 U.S. 405, 425 (1925).

under state law without a showing that navigation will be substantially impaired. Otherwise, they contend, the congressional policy of deference to state water rights laws embodied in those statutes enacted between 1866 and 1902 would be contravened.

Justice Holmes' opinion for the Court in *Sanitary District* v. *United States*, 266 U.S. 405 (1925), squarely refutes this contention. That was a suit by the United States to enjoin water diversions from Lake Michigan by an agency of the State of Illinois which had allocated the diverted water for use in a channel "of size sufficient to take care of the sewage and drainage of Chicago as the increase of population might require." 266 U.S. at 424. The Secretary of the Army, pursuant to his authority under Clause 3 of Section 10 to permit certain work and structures affecting navigable waters but not amounting to unreasonable obstructions of navigable capacity, had approved construction of a channel and water diversions from Lake Michigan up to a certain volume per minute. 266 U.S. at 423-424. When the Sanitary District threatened to divert more, the proceeding for injunctive relief was brought. Contrary to petitioners' suggestions (State Br. 44 n.25; Kern Br. 43-44), the "overwhelming evidence that [the water withdrawals in excess of a prescribed maximum] would affect navigation" (266 U.S. at 39) served *not* as the basis for the Secretary of War's assumption of permit jurisdiction but rather as the basis for his seeking a court order to enjoin the diversions because they amounted to unreasonable obstructions to navigable capacity for which the consent of Congress had not been obtained. Although the defendant Sanitary District was "proceeding under a state act," the Court nowhere suggested that the Secretary had been exceeding his authority by undertaking to monitor the diversions effected under this state water allocation plan.[26]

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[26] Petitioners' position is also undermined by a treatise which the State cites (State Br. 19) for the proposition that Congress dele-

Later federal statutes on which petitioners rely (State Br. 33-36) add nothing of substance to their argument, since the provisions cited merely recognize the interests and responsibilities of the states in developing and using their water supplies; they do not suggest that the states are thereby free to impair the navigable capacity of navigable waters or that the system prescribed by the 1899 Act for ensuring that serious impairments do not occur is inoperable where the states are concerned.

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gated "broad authority to the states" in the area of "water allocations under their water rights laws." In that treatise, 1 C. Kinney, *A Treatise on the Law of Irrigation and Water Rights* (2d ed. 1912) (hereinafter "Kinney, *Irrigation*"), published when the enactments of the Rivers and Harbors Act of 1899 and the Reclamation Act of 1902 were still of fairly recent memory, the author, a vigorous advocate of irrigation, comments on federal control of "methods of destroying the navigable capacity of a body of water [other] than by the construction of bridges or dams at navigable points." Kinney, *Irrigation* 590. He explains (*id.* at 590-591) that diversions from nonnavigable portions of streams for irrigation purposes may lessen "the flow of the navigable portion of the stream [and that the] waters from the tributaries of the stream may be diverted from their natural course to such an extent that the capacity for the navigation of the main river may be partially or wholly destroyed." He warns (*ibid.*) that "[a]ll of these must in time give way to the paramount right of navigation, unless Congress makes some radical changes in the law as it now stands, based upon the theory of the relative importance of [navigation and reclamation] interests." Commenting on the Reclamation Act of 1902 and certain other earlier statutes, he observes (*id.* at 594): "In none of these Acts is there any express right given to appropriate the waters of any navigable body of water in the United States, or in any way interfere with the navigable capacity of any of these waters."

Although this commentator was concerned primarily with the power of the federal government to *enjoin* irrigation-related diversions, he said nothing inconsistent with an understanding that structures and activities that come within the terms of the second and third clauses of Section 10 require Corps permits; and he acknowledged (Kinney, *Irrigation* 594 n.8) that the "control or supervision of the navigable waters of the United States" are "vested in the Secretary of War."

When Congress wishes to remove Corps of Engineers jurisdiction over matters that come within the term of the second or third clauses of Section 10, it does so directly. Thus, in Section 154 of the Water Resources Development Act of 1976, 33 U.S.C. 59*l*, Congress declared:

> The prohibitions and provisions for review and approval concerning wharves and piers in waters of the United States as set forth in sections 403 and 565 of this title shall not apply to any body of water located entirely within one State which is, or could be, considered to be a navigable body of water of the United States solely on the basis of historical use in interstate commerce.

Similarly, in Section 162 of the same statute, 33 U.S.C. 59*m*, Congress has declared three specific lakes "non-navigable" for "the purposes of [33 U.S.C.] 403." If Congress wishes to remove state water allocation systems from the coverage of Section 10, it may do so expressly. In urging their reading of Section 10 of the 1899 Act, petitioners are asking this Court to do the work of Congress.

Petitioners are not aided in their proposed construction of Section 10 by the federal preemption cases involving other areas of law on which they rely (State Br. 40-43; Kern Br. 35-36). This is not a case in which it is urged that comprehensive federal regulation of a field excludes state regulation. See *e.g.*, *Florida Lime & Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The court of appeals did not hold that all state water allocations are preempted by federal regulation of navigable waters. It held only that in effectuating allocation plans, states may not violate express provisions of Section 10 of the 1899 Act: they may not create unreasonable obstructions to the navigable capacity of any water of the United States without the consent of Congress and they may not build the structures or engage in the activities described in the second and third clauses of Section 10—without proper

approvals from the Secretary of the Army and the Corps of Engineers. None of the preemption cases cited by petitioners holds that states may do what a federal statute expressly forbids or that provisions of state law in direct conflict with federal law are valid.[27]

Finally, we note that there is no reason to assume that, in exercising its jurisdiction under Section 10 of the 1899 Act, the Corps of Engineers will disrupt state allocations of water without substantial reasons for doing so. The policy of deferring to state law respecting water rights where consistent with federal law can be accommodated in the permitting process. The Corps can, for example, issue a "general permit" for "a category or categories of structures or work in a specified region of the country, when those structures or work are substantially similar in nature and cause only minimal individual and cumulative adverse environmental impact." 33 C.F.R. 322.2(f). The issuance of such permits relieves those who build structures or engage in work within the permitted categories of the necessity of applying for individual permits. The Corps can also suggest ways in which water

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[27] Thus, in *New York Dep't of Social Services* v. *Dublino*, 413 U.S. 405 (1973), the Court found no evidence that Congress intended a federal work incentive program for public assistance recipients to preempt state work programs for such persons; but it remanded for a determination whether particular provisions of the two laws were in conflict. 413 U.S. at 422-423.

Parker v. *Brown*, 317 U.S. 341 (1943), on which the State relies heavily (State Br. 40 n.21, 48-49), is not to the contrary. There the Court held that the Sherman Act was not intended to apply to state marketing programs because the evils which the Act was designed to eliminate were restraints of trade operating by individual agreement, not "act[s] of government." 317 U.S. at 351-352. The evils the 1899 Act is aimed at eliminating are obstructions to navigable capacity—clearly not "acts of government," although they may be by-products of state governmental operations. Since, as we have demonstrated above (pages 32-33, *supra*), activities by states are covered by the 1899 Act, the general rule that state action is preempted when it conflicts with express provisions of federal law is fully applicable.

diversions can be made—for example, timing releases in relation to tidal cycles—so as to minimize the likelihood of serious impairments of navigable capacity. In sum, only where protection of federal interests demands will the Corps have any reason to call for modifications of water diversions planned by the state; and, of course any such permit conditions are fully reviewable under the Administrative Procedure Act. See 5 U.S.C. 702, 704.[28]

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[28] On June 15, 1967, the District Engineer for the Sacramento District Corps of Engineers granted a permit to the State under Section 10 of the 1899 Act, permitting it to "cut the westerly levee of West Canal, at Clifton Court Tract for Clifton Court Forebay in Contra Costa County, California" in accordance with plans shown on an attached drawing (J.A. 115a-116a). Both courts below concluded (Pet. App. 50-51, 96-99) that the permit could not constitute authorization for the Delta Pumping Plant because the State's application for the permit had not described the pumping plant or the scope of its present or future operations.

We believe that, for the reasons set forth in the opinion of the court of appeals (Pet. App. 50-51), the courts are correct in that conclusion. It is nevertheless, possible that the pumping plant's present operations are considered to have been permitted under the grandfather clause in Corps regulations, 33 C.F.R. 322.4(g). Pursuant to that regulation, the Corps permits all "[s]tructures or work completed before 18 December 1968 * * * provided there is no interference with navigation." It is a question of fact not yet resolved in this case whether the Delta pumping plant was completed before the critical date in 1968 (see page 11, *supra*). Of course the State will need a permit for the proposed enlargement of the plant's pumping capacity by 60% (see State Br. 10 n.6) and for the construction of the Peripheral Canal.

CONCLUSION

The judgment of the court of appeals should be reversed with directions that the complaint be dismissed for failure to state a claim. Should the Court, however, hold that plaintiffs were entitled to bring this action to enforce Section 10 of the Rivers and Harbors Act of 1899, then the judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

JACQUES B. GELIN
ROBERT L. KLARQUIST
Attorneys

DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 334752 207